



State of Arizona
Citizens Clean Elections Commission

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M E M O R A N D U M

To: Commissioners

From: Todd F. Lang, Executive Director

Date: September 6, 2006

Subject: Possible Independent Expenditure

On September 5, 2006, Commission staff received a letter from Douglas V. Drury, in his capacity as counsel to the campaign of Len Munsil ("Munsil"), a participating candidate for Governor, regarding phone calls characterized as a "push poll"¹ targeting Republican voters. The Munsil letter contends that the phone calls constitute an independent expenditure against the Munsil campaign and requests that the Commission issue matching funds to Munsil equal to the value of the phone calls.

Also on September 5, 2006, Commission staff received a letter for Don Goldwater ("Goldwater"), a participating candidate for Governor, regarding the same phone calls described in the Munsil letter. The Goldwater letter contends that no matching funds should be issued unless the Commission is certain that the phone calls were not authorized by any gubernatorial campaign. If the Commission does issue matching funds, the Goldwater letter requests that such funds be issued to the Goldwater campaign, citing the phone calls' allegedly detrimental impact to the Goldwater campaign.

The Executive Director recommends the Commission find that the phone calls qualify as an independent expenditure against Munsil and issue matching funds to the Munsil campaign.

I. Factual Background

The phone calls ask a series of questions relating to Goldwater and Munsil. The Munsil letter sets forth a transcript of the phone calls, which feature slight variations on the following questions:

- *Do you support Don Goldwater's plan to build a wall on Arizona's border?*

¹ The National Council on Public Polls (NCPP) describes a push poll as, "... a telemarketing technique in which telephone calls are used to canvass vast numbers of potential voters, feeding them false and damaging "information" about a candidate under the guise of taking a poll to see how this "information" effects voter preferences. In fact, the intent is to "push" the voters away from one candidate and toward the opposing candidate."

- *Len Munsil has been touted as a family value candidate. Would it affect your vote if you knew he had an illegitimate child?*
- *Would it affect your vote if you knew Len Munsil said the terrorist attack of 9-11 was an act of God?*

The number of recipients of the phone calls is unknown. The Munsil campaign has produced affidavits from four persons who received calls featuring substantially similar messages. Two of the affiants declare that they heard in the background other persons reading from similar scripts, which would seem to indicate that the calls were part of a phone banking effort. All of the affiants are residents of Maricopa County, although one of the affidavits bears a notarial seal from Yavapai County.

Preliminary inquiries by Commission staff have produced no evidence or admissions that other gubernatorial campaigns were involved in the phone calls. The Goldwater letter includes a signed, sworn statement from Goldwater disclaiming any involvement by his campaign in making the phone calls.

III. Analysis

A. Independent Expenditures

Arizona Revised Statutes § 16-901(14) provides the following definition for the term “independent expenditures”:

“Independent expenditure” means an expenditure by a person or political committee, other than a candidate’s campaign committee, that expressly advocates the election or defeat of a clearly identified candidate, that is made without cooperation or consultation with any candidate or committee or agent of the candidate and that is not made in concert with or at the request or suggestion of a candidate, or any committee or agent of the candidate.

With no reason to believe that any campaign directly authorized, cooperated or consulted with the making of these phone calls, the question of whether the phone calls constitute independent expenditures depends on whether they “expressly advocate the election or defeat of a clearly identified candidate.” The phone calls identify Goldwater and Munsil by name, so the “clearly identified candidate” requirement is satisfied.

The standard for determining whether the phone calls contain express advocacy is set forth in A.R.S. § 16-901.01. The advertisements do not directly urge recipients to “vote for” or “elect” a candidate, which would qualify the phone calls as express advocacy under A.R.S. §16-901.01(A)(1). However, the advertisements might still constitute express advocacy pursuant to A.R.S. §16-901.01(A)(2), which defines express advocacy to include:

... a general public communication, such as in a broadcast medium, newspaper, magazine, billboard, or direct mailer referring to one or more clearly identified candidates and targeted to the electorate of that candidate(s):

*(a) That in context can have **no reasonable meaning other than to advocate the election or defeat of the candidate(s)**, as evidenced by factors such as the presentation of the*

candidate(s) in a favorable or unfavorable light, the targeting, placement, or timing of the communication, or the inclusion of statements of the candidate(s) or opponents...
(Emphasis added.)

In my estimation, a series of phone calls targeting Republican voters is as much a general public communication as a direct mailer to such voters. As noted above, Goldwater and Munsil are clearly identified by name. The sole remaining issue is whether the phone calls' message can have "no reasonable meaning other than to advocate the election or defeat of the candidate(s)."²

The portion of the phone calls referencing Goldwater asks whether the recipients of the calls support his "plan to build a wall on Arizona's border."³ In his letter, Goldwater argues that the question harms his campaign by "oversimplifying and misrepresenting" his plan to secure the border. He further contends that the party who sanctioned the calls "intended to damage [Goldwater's] integrity" by associating with offensive questions regarding Munsil.

While I acknowledge that Goldwater has emphasized a border security plan detailed and described in the poll, and while I respect that he would not wish to be associated with a poll that voters might deem offensive, I am not persuaded that these considerations elevate the phone calls to express advocacy against the Goldwater campaign. The question referencing Goldwater is not clearly calibrated to influence recipients of the phone calls to support or oppose the Goldwater candidacy, but seems geared to gauge support for a policy position he has unequivocally adopted.

By contrast, I believe that the questions regarding Munsil were clearly calibrated to influence recipients of the phone calls to oppose his candidacy. In particular, the question asking whether it would influence a recipient's vote to know that Munsil had an illegitimate child appears a thinly veiled effort to cast Munsil in a negative light and to advocate his defeat.

For the foregoing reasons, I recommend that the Commission determine that the phone calls contain express advocacy and constitute an independent expenditure against Munsil.⁴ I recommend that the Commission determine that the phone calls do not contain express advocacy or constitute an independent expenditure against Goldwater.

B. Matching Funds

Independent expenditures on behalf of non-participating candidates trigger matching funds pursuant to A.A.C. R2-20-113(A)(2), which provides:

² The Commission has also adopted A.A.C. R2-20-109(D)(3)(C), which provides the following guidance for determining whether a message constitutes express advocacy: "*It must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action. If any reasonable alternative reading of speech can be suggested, it cannot be express advocacy subject to the Act's disclosure requirements.*"

³ Goldwater's campaign website (<http://www.goldwater4governor.org>) describes his Border Security plan, which includes among other elements a prescription to: "*Install Fences/Wall/Border Road to reduce incursion.*"

⁴ I consider it irrelevant, for purposes of determining whether they contain express advocacy, if the phone calls were designed to gather information about voter attitudes towards potential attacks on Munsil or if they were instead intended merely to advocate against Munsil without any information gathering function. In either case, I believe that the nature of the questions is clearly intended to cast Munsil in a negative light and thereby to advocate for his defeat.

If an independent expenditure is made against a participating candidate, the participating candidate will be eligible to receive matching funds, if applicable, for the amount of the independent expenditure. The participating candidate who was the subject of the expenditure will be the only candidate eligible to receive the matching funds, if applicable, for the cost of that expenditure.

Given my recommendation that the Commission determine that the phone calls constituted an independent expenditure against Munsil, I further recommend that the Commission issue matching funds to his campaign pursuant to A.A.C. R2-20-113(A)(2).

In this instance, the amount of the independent expenditure is unknown. To the knowledge of Commission staff, no independent expenditure committee has come forward to acknowledge responsibility for placing the phone calls, declare the number of calls placed, or indicate the cost of placing the phone calls. Under these circumstances, it is difficult to affix a value to the independent expenditure against Munsil.

However, the Commission has recently considered a matter involving facts very similar to the circumstances of this case. At its meeting on August 30, 2006, the Commission awarded matching funds to Ted Downing (“Downing”), a participating candidate for Senate in Legislative District 28, based on a series of phone calls placed to voters in his district. In the Downing matter, the Commission adopted a recommendation to award matching funds in the amount of \$7,974.00, a figure arrived at by multiplying the 11,075⁵ voters in Legislative District 28 by a rate of \$0.72 per call.⁶

In retrospect, while I am confident that staff did our best under the circumstances to estimate the value of the anti-Downing independent expenditure, our recommendation that the phone calls at issue there were placed to approximately 11,000 voters was belied by the affidavit received by Commission staff on September 6, 2006.⁷ In the end, the public was well-served by the issuance of matching funds in Downing, as this prompted the vendor to provide accurate information regarding the poll. Independent expenditure committees should do everything possible to provide the necessary information to the public and the State.

Downing presented evidence of five persons (including Downing himself) who were contacted by callers with the anti-Downing message. Evidence has since come to light that the phone calls at issue in the Downing matter were part of a polling operation designed to test messages that would ultimately appear on an anti-Downing mailer and that such calls were directed at a much smaller group of 209 recipients.⁸ The experience with the Downing matter illustrates the problem with treating a small number of calls as evidence of an effort to contact all the voters in a primary election race.

The Munsil campaign has asked for matching funds based on the \$0.72 per call rate used in Downing multiplied by the number of votes cast in the 2004 Republican primary election. While I am not disposed to extrapolate a handful of acknowledged recipients into the entire primary election constituency of a candidate, I believe that fairness requires that the award of

⁵ This figure represents the number of voters in the 2002 Democratic primary election in Legislative District 28.

⁶ This figure was in the middle of a range of quotes obtained by Commission staff from companies in the business of conducting polls and phone banks in connection with political campaigns.

⁷ See Affidavit of Michelle Davidson (September 6, 2006) (unpublished affidavit, on file with Citizens Clean Elections Commission).

⁸ See *id.*

matching funds in the present matter should be at least as much as the award in the Downing case. In each instance, the party against whom independent expenditures were directed produced evidence of a handful of persons contacted with the respective phone calls. Downing cited five recipients of the anti-Downing call. Munsil has produced affidavits from four recipients of the anti-Munsil call, with assurances of more affidavits to come.

Since all the affidavits produced by Munsil are from recipients who reside in Maricopa County, I believe that the votes cast by Maricopa County residents cast in the last Republican primary election involving gubernatorial candidates is an appropriate starting point for calculating matching funds. Multiplying the 183,811 votes cast by Maricopa County residents in the 2002 Republican primary election by \$0.72 produces a figure of \$132,343.92. In recognition that the figure is speculative and that the number of affiants is relatively small, I would further discount this amount. I therefore recommend an award of matching funds to Munsil in the amount of \$80,000.00.

The \$80,000.00 amount I recommend is not the full amount requested by the Munsil campaign, but given the lack of confirming information available, I believe it is appropriate and fair. Push polls are a scourge. But independent expenditure committees engaged in legitimate polling need to understand the impact of their actions. If such committees do not want to trigger disproportionate matching funds, then they should report their activities promptly. Otherwise, the requirements of matching funds and express advocacy definitions dictate that matching funds be issued for what appear to “push polls.” I understand that advocacy groups may seek to exploit this policy, and I therefore recommend that the Commission evaluate future polls on a case-by-case basis.

III. Recommendation

My recommendation is that the Commission find that the phone calls contain express advocacy and constitute independent expenditures against Munsil. As a result, I recommend that the Commission issue matching funds to Munsil in the amount of \$80,000.00.

Dated this 6th day of September, 2006

By: _____
Todd F. Lang, Executive Director